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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JERRY GARCIA,

Plaintiff and Appellant,

v.

THE BANK OF NEW YORK MELLON et al.,

Defendants and Respondents.

H043614, H044082

(Santa Clara County

Super. Ct. No. CV285957)

Plaintiff Jerry Garcia is a homeowner seeking relief from the threatened sale of his home by nonjudicial foreclosure. Garcia claims on appeal that the assignment of the deed of trust securing his loan on the property was invalid pursuant to provisions of the California Homeowner Bill of Rights (HBOR) (Civ. Code, § 2923.4 et seq.)¹ and the subsequent recording of notices of default and trustee's sale were unauthorized.

Garcia sued four entities and one individual with ties to the deed of trust on his home (collectively, defendants)² to collect damages and prevent the sale of the property.

¹ Unspecified statutory references are to the Civil Code.

² Defendants are the trustee of the securitized trust holding his loan, The Bank of New York Mellon, frequently known as The Bank of New York Mellon as trustee for the certificate holders of the CWALT, Inc. Alternative Loan Trust 2005-62 Mortgage Pass-Through Certificate, Series 2005-62 (Bank of New York Mellon or the Bank); the nominal beneficiary under the deed of trust, Mortgage Electronic Registration Systems, Inc. (MERS); Garcia's home loan servicer, Select Portfolio Servicing, Inc. (SPS); the foreclosure trustee under the deed of trust, the Wolf Law Firm (Wolf); and the individual who executed the assignment, Barbara DiPrimo (DiPrimo).

The court denied Garcia's request for a preliminary injunction against the foreclosure sale and later sustained defendants' demurrers to the first amended complaint (complaint) without leave to amend. The court thereafter entered a judgment in favor of defendants.

Garcia separately appeals from (1) the order denying a preliminary injunction, and (2) the judgment of dismissal and orders sustaining defendants' demurrers without leave to amend. We consider both appeals together.³ As explained herein, we find the trial court properly sustained the demurrers. This renders moot the appeal from the order denying Garcia's request for preliminary injunction. We will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual summary is based on the complaint and publicly recorded documents attached to the complaint.⁴ (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*) [court reviewing a demurrer "accept[s] the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law" and "may also consider matters subject to judicial notice"].)

In September 2005, Garcia obtained a \$696,400 home loan from America's Wholesale Lender. The note evidencing the loan (note) was secured by a deed of trust on the residential property where Garcia lives with his family in San Jose, California. The deed of trust identified America's Wholesale Lender as the beneficiary, MERS as the

³ On this court's own motion, we order the preliminary injunction appeal (No. H043614) and demurrer appeal (No. H044082) to be considered together.

⁴ The trial court granted defendants' request for judicial notice of the deed of trust recorded on September 30, 2005, substitution of trustee recorded on May 27, 2015, and the original complaint, which we note contains in exhibits the assignment of the deed of trust recorded on September 2, 2009, and the notices of default and of trustee sale, recorded on May 2, 2015 and September 4, 2015, respectively. As explained in *Yvanova*, judicial notice of both the existence and facial contents of these recorded documents was proper under Evidence Code sections 452, subdivisions (c) and (h), and 453, making notice by this court mandatory under Evidence Code section 459, subdivision (a). (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. 1.)

nominal beneficiary under the deed of trust, and CTC Real Estate Services as the trustee. Garcia alleges that starting in 2009, defendants engaged in a joint venture and conspiracy to “enforc[e] an alleged secured indebtedness” on the property and to exercise the power of a nonjudicial foreclosure sale.

On August 31, 2009, Barbara DiPrimo, as “Assistant Secretary” of MERS executed a substitution of trustee and assignment of deed of trust (assignment) to substitute Recontrust Company as trustee and assign “all beneficial interest” under the deed of trust to Bank of New York Mellon. The assignment was notarized by notary public Angeles Medina and recorded in Santa Clara County on September 2, 2009. Garcia alleges the assignment was fraudulent and void because DiPrimo was not an “assistant secretary” of MERS and was never an employee or corporate officer of MERS, nor was she an officer of America’s Wholesale Lender. DiPrimo at the time “was an employee working for Recontrust Company . . .” who had no legal authority to execute the assignment. Relying on the validity of the assignment and believing Bank of New York Mellon to be the beneficiary, Garcia made payments to the servicer and engaged in modification activities with SPS. The Bank executed a substitution of trustee substituting Wolf for Recontrust. On May 27, 2015, Wolf recorded a notice of default and election to sell under deed of trust (notice of default) which stated that \$382,404.81 was due on the loan. On September 4, 2015, Wolf recorded a notice of trustee’s sale for Garcia’s property. The trustee’s sale was scheduled to take place on September 30, 2015, but was postponed by the filing of Garcia’s initial complaint, first amended complaint, and *ex parte* request for a temporary restraining order to block the sale.⁵

Garcia asserts causes of action for: (1) statutory violations against the Bank, SPS, Wolf, and DiPrimo for attempting to foreclose without legal authority (§§ 2924, subd. (a)(6); 2924.17, subd. (b); 2924.12, subd. (h)); (2) declaratory judgment against

⁵ There is nothing in the record to show that the trustee’s sale has taken place.

defendants; (3) slander of title against the Bank, SPS, Wolf, and DiPrimo for damages caused by the invalid foreclosure notices;⁶ (4) attempted unlawful foreclosure against the Bank, SPS, Wolf, and DiPrimo based on a void assignment; (5) violation of the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq., against the Bank, SPS, Wolf, and DiPrimo; and (6) fraud against the Bank, SPS, Wolf, and DiPrimo.

The trial court granted Garcia's *ex parte* request for a temporary restraining order and enjoined the sale pending a hearing on the preliminary injunction. While the preliminary injunction motion was pending, the Bank, MERS, SPS, and Wolf (together, the entity defendants) filed a demurrer to the complaint (joint demurrer). DiPrimo filed a separate demurrer. The court denied the request for a preliminary injunction on November 12, 2015, finding Garcia had "not met, with competent evidence, his burden of establishing that he is likely to prevail at trial." Garcia timely appealed from the denial of a preliminary injunction (Code Civ. Proc., § 904.1, subd. (a)(6)). On June 9, 2016, the trial court sustained both demurrers without leave to amend.

The court ruled on the entity defendants' joint demurrer that under the recently-decided California Supreme Court decision in *Yvanova, supra*, 62 Cal.4th 919, the allegations of the complaint were insufficient to show the assignment of the deed of trust was void, not merely voidable. Consequently, the court found Garcia lacked standing to challenge the assignment. The court rejected Garcia's assertion that the law authorizes borrowers to preemptively challenge the foreclosing entities' authority to pursue foreclosure and held that causes of action brought under the HBOR were not viable because the statute is not retroactive. The court concluded that Garcia's first, second, and fourth causes of action could not state a claim for damages, injunctive relief,

⁶ The complaint labels both the declaratory judgment and slander of title causes of action as the "Second Cause of Action."

and declaratory relief based on the alleged defects in the assignment. The court also found that Garcia had failed to allege and could not plead the element of prejudice required to support the wrongful foreclosure claim. The court disposed of Garcia's third and sixth causes of action for slander of title and fraud based on the insufficiency of the alleged defect in the assignment. It concluded as to the fifth cause of action that Garcia could not state a claim under the UCL absent some underlying violation of law.

The court reached a similar result on DiPrimo's demurrer. It concluded that Garcia's allegations of a defective assignment could not support a cause of action for violations of the HBOR, since the statute is not retroactive and the allegations did not demonstrate standing to challenge the assignment. It further found Garcia's conspiracy claim against DiPrimo to be unsupported by the allegations of the complaint. The court overruled DiPrimo's demurrer based on misjoinder of parties, finding it was "not apparent" that complete relief could not be accorded among the named parties.

The court denied leave to amend the complaint on the ground that Garcia had failed to demonstrate " 'in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' " (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The court entered judgment on June 29, 2016, dismissing with prejudice all causes of action asserted against defendants. Garcia timely appealed the judgment of dismissal.

II. DISCUSSION

Garcia asserts in both appeals that the trial court failed to credit the complaint allegations demonstrating the invalidity of the assignment and defendants' resulting lack of authority to proceed with the foreclosure. We focus at the outset on the demurrer appeal for the obvious reason that an affirmance of the judgment of dismissal will render the preliminary injunction appeal moot. (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623 (*MaJor*) [appeal from denial of preliminary injunction mooted by trial court sustaining demurrer without leave to amend the only cause of action that might

have supported a preliminary injunction].) That is, absent a change in judgment, appellate review of the order denying a preliminary injunction would have no practical effect. (See *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.) If we conclude that the trial court erred in sustaining the demurrers, however, then we must consider as to the surviving causes of action whether the court abused its discretion in denying the motion for preliminary injunction. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.)

A. Standard of Review

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, our review is de novo. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) In performing our independent review of the complaint, we assume the “truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law.” (*Yvanova, supra*, 62 Cal.4th at p. 924; *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We “give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.” (*Evans, supra*, at p. 6.) After reviewing the allegations of the complaint, the complaint’s exhibits, and the matters properly subject to judicial notice, we exercise our independent judgment as to whether the complaint states a cause of action as a matter of law. (See *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Committee for Green Foothills, supra*, at p. 42.)

B. The Complaint Does Not State a Cause of Action For Statutory Violations Under the HBOR

Garcia contends that the trial court erred in sustaining the demurrer because the complaint alleged a valid cause of action for statutory violations under the HBOR.

He does not independently challenge the ruling sustaining the demurrers on the other six causes of action.⁷

The thrust of Garcia's cause of action for statutory violations is that defendants lacked the authority under the HBOR to initiate the foreclosure process due to inaccuracies in the robo-signed assignment, which rendered it void and invalid.⁸ On appeal, Garcia identifies section 2924.17, subdivision (a) of the HBOR (hereafter section 2924.17(a)) as the "crucial statute" supporting this cause of action. Section 2924.17(a) requires a recorded assignment of a deed of trust to "be accurate and complete and supported by competent and reliable evidence." Garcia contends that the assignment violated this standard, given DiPrimo's false representation that she was signing on behalf of MERS as an assistant secretary.

As the entity defendants point out, however, the complaint did not assert a violation of section 2924.17(a). Rather, the statutory violations cited in the cause of action included two provisions of the HBOR that pertain to the authority to record a notice of default (§ 2924, subd. (a)(6))⁹ and the right to foreclose (§ 2924.17, subd. (b)).¹⁰ Garcia recognizes that he did not expressly assert a violation of section 2924.17(a) in the

⁷ Accordingly, Garcia forfeits any claim of error not raised on appeal. (*Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 260 ["appellant's failure to raise an argument in its opening brief waives the issue on appeal"]; *Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [same].)

⁸ The cause of action for statutory violations excludes MERS.

⁹ Section 2924, subdivision (a)(6) states in part, "No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest."

¹⁰ Section 2924.17, subdivision (b) states, "Before recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information."

complaint but is not dissuaded from relying on it on appeal. He argues that he *effectively* alleged a section 2924.17(a) violation given the facts asserted in the complaint, that he does not seek retroactive application of the HBOR, and that the section 2924.17(a) violation supplies standing for him to pursue his claims preforeclosure. Defendants challenge Garcia’s statutory claim on each of these grounds, which we address in turn.

1. Garcia Did Not Forfeit the Claimed Violation of Section 2924.17(a)

The entity defendants invoke the principle that theories not raised in the trial court generally may not be asserted for the first time on appeal. (See *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519 (*Brandwein*), citing Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 8:229, p. 8-155 (rev. # 1, 2011).) This is in essence a forfeiture argument. “[F]orfeiture is the ‘ “failure to make the timely assertion of a right.” ’ ” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 521, fn. 3.) It is a procedural principle “designed to advance efficiency and deter gamesmanship.” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.)

Theories raised for the first time on appeal are subject to the forfeiture rule based on these same “common notions of fairness.” (*Brandwein, supra*, 218 Cal.App.4th at p. 1519; *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178 [“Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider.”].) Even so, a reviewing court has discretion to reach a legal issue presented on appeal despite a party’s failure to raise the issue in the trial court. (*Brandwein, supra*, at p. 1519; *JRS Products, supra*, at p. 179.)

We exercise our discretion to consider Garcia’s section 2924.17(a) claim for several reasons. Although Garcia neither alleged a section 2924.17(a) violation in the complaint nor presented argument to the trial court based on that provision of the statute, a section 2924.17(a) violation is implied in Garcia’s allegations under subdivision (b) of

that same section. Subdivision (b) states, “Before recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower’s default and the right to foreclose” (§ 2924.17, subd. (b).) Subdivision (a) states in part, “[A] notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, . . . shall be accurate and complete and supported by competent and reliable evidence.” (§ 2924.17(a).)

The complaint alleged that the assignment misrepresented DiPrimo’s authority to execute the transaction on behalf of MERS, that the assignment was “fraudulent and void,” and that defendants failed to ensure “the right to foreclose” in violation of section 2924.17, subdivision (b). Thus, according to the complaint, the alleged basis for the section 2924.17, subdivision (b) violation was the absence of “competent and reliable evidence” of defendants’ “right to foreclose” (§ 2924.17, subd. (b)) due to the fact that the assignment was fraudulent. We agree with Garcia that these allegations identified the material elements of a section 2924.17(a) violation and put defendants on notice of a claim that the assignment was not “accurate and complete and supported by competent and reliable evidence” (§ 2924.17(a)). The proximity and relatedness of the statutory provisions viewed alongside Garcia’s factual allegations undercuts any claim of surprise or unfairness to defendants. (Cf. *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1127 [appellant’s “untimely, oblique reference to the statute” in the trial court “gave respondent no opportunity to rebut” the presumption at issue and was forfeit].)

What is more, we agree with Garcia that invoking section 2924.17(a) on appeal raises a purely legal question about whether the complaint adequately stated a cause of action (or could be amended to state a cause of action (Code Civ. Proc., § 472c)) based on that provision. To the extent that Garcia does not seek to introduce factual allegations or evidence not before the trial court, we find his argument consistent with an appellant’s

ability to raise for the first time on appeal a pure question of law based upon undisputed facts. (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259; see also *Araiza v. Younkin, supra*, 188 Cal.App.4th at p. 1127 [recognizing that a party may raise a pure question of law for the first time on appeal].) Indeed, “ ‘[w]hen a demurrer is sustained without leave to amend the petitioner may advance on appeal a new legal theory why the allegations of the petition state a cause of action.’ ” (*Dudley, supra*, at p. 259.)

We conclude that Garcia did not forfeit his contention on appeal that he has stated a valid cause of action based on a section 2924.17(a) violation.

2. Garcia Cannot Apply Section 2924.17(a) Retroactively

Garcia argues that as a consumer protection statute, the HBOR must be construed liberally to favor borrowers. He proposes a broad interpretation of the requirement under section 2924.17(a) that any “assignment of a deed of trust . . . shall be accurate” Garcia contends that DiPrimo’s misrepresentation of her position as a MERS assistant secretary meant that the assignment was not “accurate” within the meaning of the statute. He claims that the statutory violation voids the assignment and supplies the basis for his standing to bring a preemptive suit challenging defendants’ authority to initiate a foreclosure.

The entity defendants and DiPrimo dispute the viability of any claim based upon section 2924.17(a). They argue that (1) Garcia improperly seeks retroactive application of the statute, (2) the alleged violation is not material and does not render the assignment void, and (3) Garcia lacks standing to make a preforeclosure challenge on the basis that the assignment is voidable. We agree that Garcia cannot state a cause of action for a statutory violation of section 2924.17(a) because the statute was not in effect at the time of the challenged assignment and does not apply retroactively.

The assignment was executed in August 2009 and recorded in September 2009, several years before the Legislature enacted the HBOR in 2012. (See Stats. 2012, ch. 86, §§ 1-25; *Yvanova, supra*, 62 Cal.4th at p. 941.) The legislation took effect on January 1, 2013. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86, fn. 14.) Our general presumption is that “legislation operates prospectively rather than retroactively.” (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 (*Myers*).) “[U]nless there is an ‘express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ ” (*Ibid.*) Applying this presumption, the Court of Appeal in *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808 (*Saterbak*) rejected a similar attempt by a borrower to challenge alleged defects in an assignment of deed of trust under sections 2924.17 and 2924.12, noting the statute took effect after the assignment was recorded. (*Saterbak, supra*, at p. 818 [finding appellant had “fail[ed] to point to any provision suggesting that the California Legislature intended the HBOR to apply retroactively”].)

Garcia maintains that he does not seek retroactive application of the statute. He instead frames the timing issue in relation to when his cause of action accrued. He argues that a cause of action did not accrue in 2009 with the invalid assignment; rather he “suffered real harm for the first time when a foreclosure was threatened” upon issuance of the notice of default on May 27, 2015, two years after the statute took effect. Garcia emphasizes that because he was limited to seeking injunctive relief for the alleged violation of section 2924.17 (§ 2924.12, subd. (a)(1)),¹¹ his statutory cause of action only

¹¹ The HBOR provision authorizing a preforeclosure suit for injunctive relief states, “If a trustee’s deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.” (§ 2924.12, subd. (a)(1).)

accrued when the Bank had the foreclosure trustee issue a notice of default, thus threatening “real immediate harm” to his legal rights.

Garcia’s argument conflates separate concepts. The accrual of Garcia’s cause of action, which he contends occurred in 2015 when Wolf recorded the notice of default and election to sell, does not determine whether section 2924.17(a) applies to conduct that occurred before the statute’s enactment. Put another way, because the challenged assignment predated the statutory section under which Garcia claims a violation, the only means for him to assert a cause of action based upon a violation of that section is for the statute to apply retroactively to the assignment.

Our Supreme Court’s guidance on the principles of retroactivity is helpful. “ ‘Generally, statutes operate prospectively only.’ ” (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 (*McClung*), quoting *Myers, supra*, 28 Cal.4th at p. 840.) This follows “ ‘the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place” ’ ” (*McClung, supra*, at p. 475.) “ ‘A statute has retrospective effect when it substantially changes the legal consequences of past events.’ ” (*Id.* at p. 472.) Thus in *McClung*, the question was whether an amendment to California’s Fair Employment and Housing Act imposed liability for earlier actions. (*Ibid.*) The court reasoned that “applying the amendment . . . would be a retroactive application because it would ‘attach[] new legal consequences to events completed before its enactment.’ [Citation.] Specifically, it would ‘increase a party’s liability for past conduct’ ” (*Ibid.*)

In our case, the allegation that the 2009 assignment was not accurate forms the exclusive basis for Garcia’s assertion of a section 2924.17(a) violation. To assign liability on that basis would unquestionably attach new legal consequences to an event (the assignment) completed before the enactment of the HBOR. (*McClung, supra*, 34 Cal.4th at p. 472.)

That Garcia’s claim may have accrued after section 2924.17(a) took effect does not salvage what would be an impermissibly retroactive application. Our high court made this point in *Myers*, when it was asked to decide a similar question about the viability of a claim that accrued after statutory amendments to repeal immunity previously granted tobacco companies in product liability suits brought by tobacco users. (*Myers, supra*, 28 Cal.4th at p. 832.) The question certified to the court was whether certain amendments to the Civil Code “ ‘that became effective on January 1, 1998, appl[ied] to a claim that accrued after January 1, 1998, but which [wa]s based on conduct that occurred prior to January 1, 1998?’ ” (*Id.* at p. 839.) Like Garcia, the plaintiff in *Myers* contended that applying the amendments “would be a *prospective* rather than a *retroactive* application of that law because” her injury—a cancer diagnosis—occurred several months after the amendments had taken effect. (*Ibid.*)

The *Myers* court rejected this approach. It explained that to have the amendments “govern product liability suits against tobacco companies for supplying tobacco products to smokers during the immunity period would indeed be a retroactive application of that statute because it could subject those companies to ‘liability for past conduct’ [citations] that was lawful during the immunity period.” (*Myers, supra*, 28 Cal.4th at p. 840.) So too here, for Garcia to maintain a cause of action for statutory violation of section 2924.17(a) would require the statute to apply retroactively to impose a legal consequence related to the assignment which did not attach at the time. (See *Myers, supra*, at p. 832.) Consequently, Garcia’s attempt to allege a section 2924.17(a) violation is unsustainable.

3. Garcia Cannot Establish Standing Based on the Alleged Statutory Violation

Garcia’s remaining arguments are similarly flawed due to his singular reliance on a section 2924.17(a) violation. For example, Garcia identifies section 2924.12 as the basis for his standing to pursue injunctive relief in the preforeclosure context. He is correct that section 2924.12, subdivision (a)(1) authorizes a borrower to seek an

injunction against a material violation of specified provisions of the HBOR if a trustee's deed upon sale has not been recorded.¹² But the only "material violation" Garcia asserts is that of the invalid assignment. Specifically, he argues that the violation of section 2924.17(a) was material because the inaccuracy—namely DiPrimo's false representation as an assistant secretary of MERS—enabled the assignment which in turn provided exclusive authority for the Bank to order foreclosure proceedings as the assigned beneficiary under the deed of trust.

This argument fails in the first instance for the reasons stated above: section 2924.17(a) may not be applied retroactively, so the 2009 assignment cannot serve as the basis for Garcia's claim for injunctive relief. (See *McClung, supra*, 34 Cal.4th at p. 472; *Myers, supra*, 28 Cal.4th at p. 840.)

Garcia also claims that the statutory violation of section 2924.17(a) voids the assignment as violative of clearly expressed public policy. He contends that under *Yvanova*, a borrower who alleges a void assignment has standing to sue for wrongful foreclosure without separately alleging prejudice.

As set forth above, Garcia's claim fails in that it hinges on the retroactive application of section 2924.17(a). Garcia's reference to the general proposition that "a contract made in violation of a regulatory statute is void" (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 435) highlights the retroactivity quandary of his position on appeal. Unlike in *MW Erectors*, which in part addressed the question of whether state law requiring contractors to maintain proper licensing at all times "automatically void[ed] all contracts entered by unlicensed contractors" (*id.* at p. 440), the regulatory framework imposing liability for recording an inaccurate assignment of deed of trust (§ 2924.17(a)) was not in place when DiPrimo recorded the assignment on behalf of MERS. Garcia is simply unable to allege

¹² See *ante*, footnote 11.

the assignment was “made in violation of a regulatory statute” (cf. *MW Erectors, supra*, at p. 435) without applying the statute retroactively.

Garcia’s reliance on *Yvanova* is also misplaced in this instance. The California Supreme Court in *Yvanova* held that “a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment” (*Yvanova, supra*, 62 Cal.4th at p. 924.) The court expressly limited its holding to the postforeclosure context (*Yvanova, supra*, at p. 924 [“We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party’s right to proceed”]) and declined to consider the validity of several Court of Appeal decisions rejecting such preemptive suits as contrary to the nonjudicial foreclosure scheme (*Yvanova, supra*, at p. 934 [noting that appellate decisions “disallowing the use of a lawsuit to preempt a nonjudicial foreclosure” are “not within the scope of our review”]).¹³ *Yvanova* therefore offers no direct support for Garcia’s preforeclosure challenge to defendants’ authority to proceed with the trustee’s sale.

We recognize that by limiting its holding to the post-sale context, *Yvanova* left open the possibility for a future case to extend similar reasoning to the standing analysis in a preforeclosure suit based on the allegedly void assignment of the note and deed of trust. (See *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 281 [noting that *Yvanova*’s determination “that borrowers have standing *after* a foreclosure

¹³ Those appellate court decisions continue to hold persuasive value here, where Garcia is in fact seeking to preempt a threatened nonjudicial foreclosure by challenging defendants’ authority to proceed with the trustee’s sale. (See, e.g., *Saterbak, supra*, 245 Cal.App.4th at pp. 814-815 [explaining that *Yvanova* did not alter a borrower’s standing obligations in the preforeclosure context, which do not extend to bringing a preemptive suit based on an alleged defect in assignment]; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 [rejecting a borrower’s right to “interject the courts” into the “comprehensive” nonjudicial foreclosure scheme by suing to determine the foreclosing entity’s authority to proceed].)

sale to allege that the assignment of a deed of trust was void raises the distinct possibility that our state Supreme Court would conclude that borrowers have a sufficient injury, even if less severe, to confer standing to bring similar allegations *before* the sale”].) This possibility does not help Garcia, however, because the only support that he offers to demonstrate the assignment is void and not merely voidable is the alleged violation of section 2924.17(a). Because that application of the statute would be retroactive, we do not consider its effect.

In sum, Garcia proffers no basis other than a section 2924.17(a) violation upon which this court might find that either demurrer was incorrectly decided. Our duty as the reviewing court is to address “only the points adequately raised by plaintiff in his opening brief on appeal.” (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066.) We find that Garcia has forfeited any other grounds for challenging the trial court’s orders sustaining defendants’ demurrers and the resulting judgment of dismissal. (See *Dieckmeyer v. Redevelopment Agency of Huntington Beach, supra*, 127 Cal.App.4th at p. 260; *Tisher v. California Horse Racing Bd., supra*, 231 Cal.App.3d at p. 361.) This includes any challenge to the trial court’s order denying leave to amend the complaint, which Garcia does not address on appeal. (Cf. *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [stating it is the plaintiff’s burden on appeal to demonstrate a reasonable possibility that an amendment would cure the defect].) Hence we find no reversible error.

C. *The Appeal From the Order Denying a Preliminary Injunction Is Moot*

Having concluded that the trial court properly sustained the demurrers without leave to amend, we shall affirm the judgment of dismissal. There accordingly remains no cause of action to support a preliminary injunction, which serves during the lawsuit as “an interim remedy designed to maintain the status quo pending a decision on the merits.” (*MaJor, supra*, 7 Cal.App.4th at p. 623, citing *Gray v. Bybee* (1943) 60

Cal.App.2d 564, 571.) This renders moot Garcia's separate appeal from the order denying a preliminary injunction. (*MaJor, supra*, at p. 623.)

III. DISPOSITION

The judgment is affirmed. The appeal of the order denying a preliminary injunction is dismissed as moot. Defendants shall recover their costs on appeal.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Grover, J.